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FILED
DEC 10 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

October Term, 1925

THE YANKTON SIOUX TRIBE OF INDIANS,
Petitioners,
v.
THE UNITED STATES OF AMERICA,
Respondent.

No. 250

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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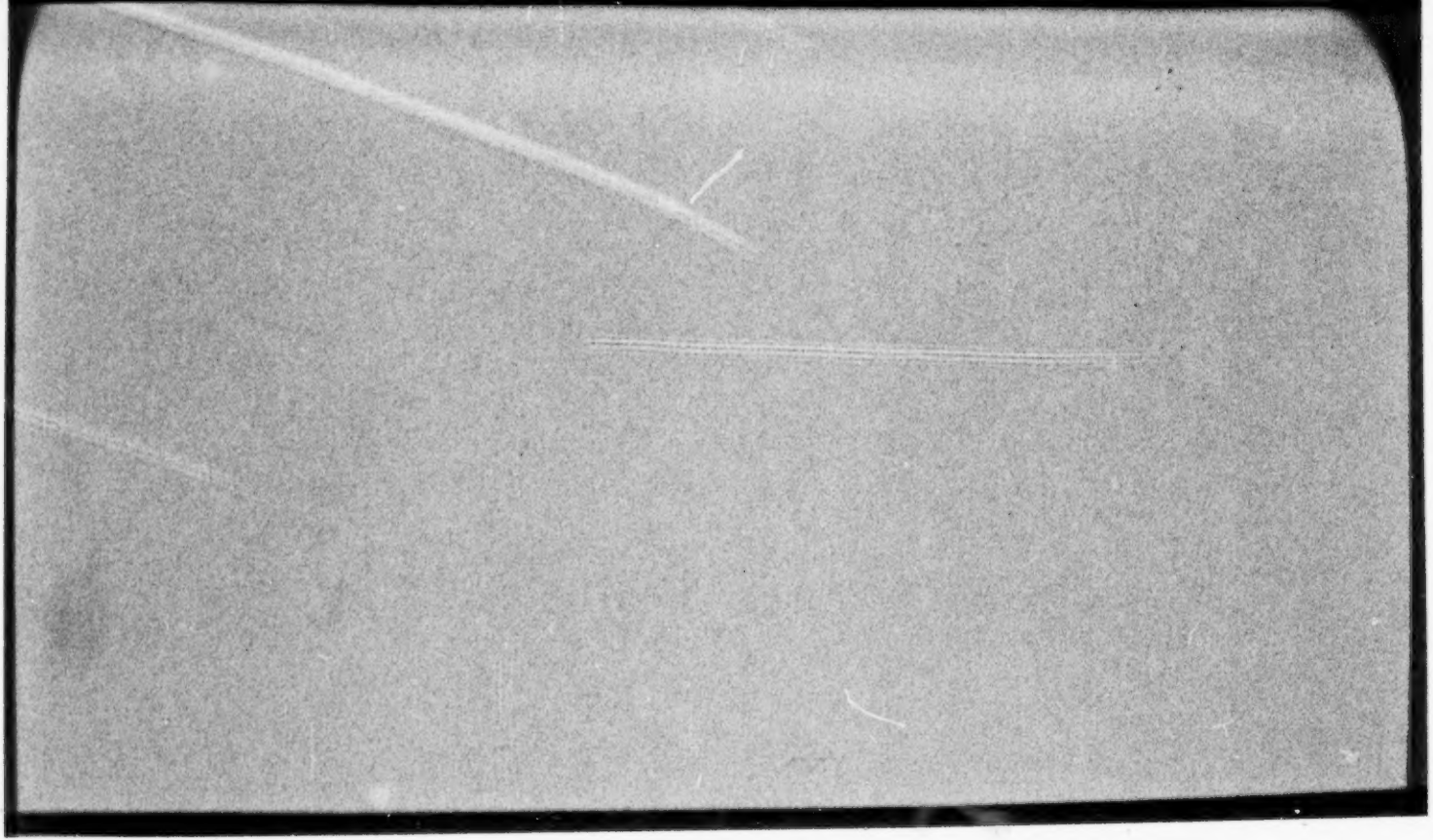

SUBJECT INDEX.

	PAGE.
Statement of Case	1
The Facts	2
The Decision of the Court of Claims	7
Specification of errors	7
Petitioners Acquired the Fee by Virtue of the Act of August 15, 1894	8
The Rights Found to Reside in Petitioners Have Been Denied	11
The Compensation Due Plaintiffs	24
The Measure of Damages	27

TABLE OF ACTS, TEXTS AND CASES CITED.

Acts.

Treaty of Apr. 19, 1858 (11 Stat. 743), referred to 1, 2, 7, 12, 17, 18, 19, 21, 23

Act of March 2, 1889 (25 Stat. 1012) 3, 4, 19, 20, 25, 26

Act of Feb. 16, 1891 (26 Stat. 764) 4, 8, 20, 26, 29

Agreement of Aug. 21, 1892, with Inspector McLaughlin, 6

Act of Aug. 15, 1894 (28 Stat. 286) 5, 8, 9, 10, 11, 12, 14, 16, 17, 24

Act of June 7, 1897 (30 Stat. 87) 6, 16, 24, 26, 27

Act of Apr. 4, 1910 (38 Stat. 284) 7

Act of June 3, 1920 (41 Stat. 738) referred to 2

Act of Jan. 9, 1925 6, 7, 24, 26

Act of Feb. 13, 1925, referred to 2

Revised Statutes 2126 21

TEXTS.

Senate Report 2369—59th Cong. (1st Session) 6
Report Secretary of the Interior, Oct. 2, 1899 27
House Document No. 535, 55th Cong. 1st Sess. 4
Lewis on Eminent Domain, pp. 584, 660 and 703 28, 29

CASES.

Ainsa *v.* New Mexico & A. R. Co. 175 U. S. 79, 81 15
Barker *v.* Harvey, 181 U. S. 481, 487 13, 15
Boteller *v.* Dominguez, 130 U. S. 238 13
Calder *v.* Bull, 3 Dall. 386 25
Clifford *v.* United States, 34 Ct. of Claims, 233 24
De La Croix *v.* Chamberlain, 12 Wheat. 599 15
Johnson *v.* McIntosh, 8 Wheat. (U. S.) 543 25
Kennedy *v.* Hunt, 7 How. 586 16
Langdeaux *v.* Hawes, 21 Wall. 521 16
Leverich *v.* Mobile, 110 Fed. 179 16
Marquette Houghton & Q. R. R. Co. *v.* Probate Judge, 53 Mich. 217 28
Muskrat *v.* United States, 219 U. S. 346 9
Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 666 24
Shoemaker *v.* United States, 148 U. S. 298 24
Stoneroad *v.* Stoneroad, 158 U. S. 240 13
Sullivan *v.* Richardson, 33 Fla. 1091, 14 So. 692 16
Treuier *v.* Stewart, 101 U. S. 797 16
U. S. *v.* Carpenter, 111 U. S. 435 2, 20
Worcester *v.* State of Georgia, 6 Peters, 515, 582 19

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THE YANKTON SIOUX TRIBE OF INDIANS, *Petitioners,*
v.
THE UNITED STATES OF AMERICA, *Respondent.* } No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition was filed in the Court of Claims July 31, 1924; September 30, 1924, the defendant below filed a general traverse; May 8, 1925, the case was submitted without argument; June 8, 1925, the judgment of the Court of Claims dismissing the petition was entered; June 22, 1925, motion for new trial and brief were filed; and October 26, 1925, the said motion was disallowed. (Record, p. 31.)

The claim set out in the petition was for compensation for the rights acquired by petitioners in the Pipestone Reservation under the treaty of April 19, 1858 (11 Stat. 743) which were alleged to have been misappropriated by the United States.

The judgment of the Court of Claims was as follows:

> "The Court, upon due consideration of the premises, found in favor of defendant, and do

order and adjudge that the plaintiffs, as aforesaid, are not entitled to recover any sum in this action of and from the United States; and that the petition be and the same is hereby dismissed." (Record, p. 31.)

The jurisdiction of the Supreme Court is invoked under the special jurisdictional act of June 3, 1920, (41 Stat. 738) which conferred upon the Court of Claims jurisdiction to hear and determine all legal and equitable claims, if any, of the Sioux tribe against the United States, "with the right of either party to appeal," and which act expressly provided for the presentation of a claim by any band of the Sioux Tribe acting separately. (Record, pp. 11-13.)

It is also invoked under Section 3 of the act of February 13, 1925.

THE FACTS.

The facts material to this petition are as follows:

April 19, 1858, appellants entered into a treaty with the United States, 11 Stat. 743, Article VIII of which is as follows:

> "The said Yankton Indians shall be secured in the free and unrestricted use of the red pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and to retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." (Record, p. 25.)

In 1884 this Court, in the case of *U. S.* v. *Carpenter*, 111 U. S. 435, vacated a patent granted by the Secretary

of the Interior May 15, 1874, to a settler on the Pipestone Reservation. (Record, p. 26.)

In 1887 the Government employed United States troops to remove intruders upon the said reservation. (Record, p. 26.)

The court will take judicial notice of the Act of March 2, 1889, (25 Stat. 1012) by which Congress directed that the value of the "Red Pipestone Indian Reservation" be appraised, including the actual value of the strip of land one hundred feet wide across the said reservation, then occupied by the Cedar Rapids, Iowa Falls and Northwestern Railway Company, "as well as the damage to the balance of the lands of said reservation by reason of the taking and occupancy of said strip for railroad purposes; * * *."

In Section 3 of the said Act of March 2, 1889, it was provided:

> "This act shall take effect and be in force and authorize the entry and sale of the said right of way, or any tract or parcel of land so appraised, so soon as, and not until, a majority of the adult male Indians of the Yankton Tribe of Sioux Indians consent to the entry and sale of such right of way, or of said appraised lands, or of any part of the same. And if said Indians shall at any future time consent in the manner above stated, to the sale or disposal of any tract or parcel of said appraised land, to the sale of which their consent had not theretofore been given, such tract or parcel shall then be sold in the manner hereinbefore provided. Patents shall be issued in due form for any lands, or the right of way, entered or sold by virtue of this act, and the moneys arising from the sale of said land, right of way, and damages, after deducting the expense of said appraisement, shall be covered into the annuity fund of said Indians, or expended in such manner as the In-

dians may determine, subject to the approval of the Secretary of the Interior; * * *."

Pursuant to this act the sum of $1,740.00 paid to the Government by the Cedar Rapids and Northern Railway Company for a right of way through the Pipestone Reservation, was distributed in 1891 by the Secretary of the Interior among petitioners. (Record, p. 26.)

The court will take judicial notice of the Act of February 16, 1891 (26 Stat. 764) by which the Secretary of the Interior was directed to cause industrial or training schools to be established in the states of Wisconsin, Michigan and Minnesota, and in Section 2 of the said act it was expressly directed that the school erected in Minnesota be located upon the Pipestone Reservation, the title to the necessary land therefor to be acquired by "purchase, condemnation, or otherwise."

The said Act of February 16, 1891, was set out in the report of Inspector James McLaughlin, found by the Court of Claims to have been submitted to Congress and printed as House Document No. 535, 55th Cong., 1st Sess. (Record, p. 27.)

Inspector James McLaughlin reported on October 2, 1899, (House Document No. 535, 55th Cong., 1st Sess. p. 31) that "all of said reservation" was appropriated without appraisal by the Department of the Interior, and a school was erected thereon as provided in Section 2 of the Act of February 16, 1891. (Record, p. 27.)

The Indians were not compensated for their rights in the said reservation as required by the Act of February 16, 1891. (Record, p. 27.)

December 31, 1892, appellants entered into a treaty

with the United States, Article XVI of which was ratified by Section 12 of the Act of August 15, 1894, (28 Stat. 286). (Record, p. 26.)

Section 12 of the Act of August 15, 1894, is as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries*, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the Court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be waiver by the United States* of all its rights to the ownership of *the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton Tribe of Sioux Indians* including the fee to the land." (Italics added.) (Record, pp. 26–27.)

The Secretary of the Interior submitted the question of the ownership of the Pipestone Quarry Reservation to the Department of Justice. (Record, p. 27.) The Attorney General advised him that it was "impracticable" to comply with Section 12 of the Act of August 15, 1894, and the Secretary of the Interior did not refer the question to the Supreme Court within one year after August 15, 1894, nor has he ever done so. (Record, p. 27.)

By the Act of June 7, 1897 (30 Stat. 87), Congress directed the Secretary of the Interior to negotiate with petitioners for the purchase of the land upon which the school on the Pipestone Reservation had been erected. (Record, p. 27.)

On October 2, 1899, Inspector James McLaughlin, acting on behalf of the Secretary of the Interior, entered into an agreement with petitioners wherein they agreed to accept $100,000.00 for their interests in the Pipestone Reservation. The said agreement of October 2, 1899, was transmitted to Congress by the Secretary of the Interior on March 24, 1900, printed as House Document No. 535, 55th Cong., 1st Sess., and on April 4, 1906, the Senate Committee on Indian Affairs rendered a favorable report thereon. (S. Rep. 2369, 59th Cong., 1st Sess.) (Record, p. 27.)

No action was taken on the said report, and petitioners have received no compensation of any kind for their rights in the Pipestone Reservation. (Record, p. 27.)

The court will take judicial notice of the fact that the school erected on the Pipestone Reservation by the Secretary of the Interior is a governmental institution, and from the official records thereof that the Pipestone Indian Training School now includes more than twenty buildings, eleven of which are of brick taken from the Pipestone Quarry, and an experimental farm which is located on the Pipestone Reservation.

By the Act of January 9, 1925 (Public No. 313, 58th Cong.) Congress conferred jurisdiction upon the Court of Claims to adjudicate the particular claim of petitioners for compensation for their rights in the Pipestone Reservation, the said act being as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Cong-*

ress assembled, That jurisdiction be, and it hereby is, conferred upon the Court of Claims to determine and report from the finding of facts reported by said court as authorized by section 22 of the Act of April 4, 1910, (Thirty-eighth Statutes at Large, page 284), the interest, title, ownership, and the right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the "Red Pipestone Quarries," described in said Act of April 4, 1910; and said court shall determine what amount, if any, is legally and equitably due from the United States, to the said Yankton Band of Santee Sioux Indians for the said quarries, and enter judgment thereon.

Sec. 2. That the court is hereby further authorized to determine what, if any, other band or bands of Sioux Indians have an interest in and to the said Red Pipestone Quarries, and the amount thereof, if any." (Record, p. 1.)

THE DECISION OF THE COURT OF CLAIMS.

Upon the foregoing findings of fact the Court of Claims decided:

> "(1) That the only interest possessed by the plaintiffs in and to the land known as the Red Pipestone Quarries is the right 'to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes,' and this right, guaranteed to plaintiffs by Article VIII of the treaty of April 19, 1858 (11 Stat. 743, 746), has been continuously secured to them since the date of said treaty by the United States in strict conformity with the terms of said treaty." (Record, p. 28.)

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in holding that under the Act of January 9, 1925, petitioners are not entitled

to compensation for the appropriation pursuant to the Act of February 16, 1891, by the United States of the Pipestone Reservation to the use of a Federal Indian Industrial School.

2. The Court of Claims erred in holding that petitioners did not acquire the fee in the Pipestone Reservation under the Act of August 15, 1894, through the failure of the Secretary of the Interior to refer the question of ownership of the said Pipestone Reservation to the Supreme Court before August 15, 1895.

3. The Court of Claims erred in not rendering judgment in favor of petitioners for damages in the sum of $100,00.00, with interest thereon to date from February 16, 1891, for the misappropriation by the United States of February 16, 1891, of the said reservation.

I.

PETITIONERS ACQUIRED THE FEE BY VIRTUE OF THE ACT OF AUGUST 15, 1894.

It is submitted that the right, title, claim, or interest of petitioners in the Pipestone Reservation prior to August 15, 1895, is immaterial in this case.

The Court of Claims found that on December 31, 1892, a treaty was entered into between appellants and the United States, which was ratified by Section 12 of the Act of August 15, 1894 (28 Stat. 286), Article XVI of which treaty was as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries*, the

> Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be a waiver of the United States* of all its rights to the ownership of *the said Pipestone Reservation*, and the same shall thereafter be solely the property of the *Yankton Tribe of Sioux Indians*, including the fee to the land." (Italics added.)

With reference to the foregoing article, the Court of Claims said:

> "Article XII of the treaty of 1892, ratified by Section 12 of the Act of August 15, 1894, 28 Stat. 286, 314, 317, 319, in no wise constitutes a recognition of title to lands in question in the Indians. What the legislation covers is a mere grant of authority and discretion to determine the validity of the Indians' persistently asserted claim to the lands. The terms of this article are *sui generis*. Manifestly, it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge. The Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensible to its performance was beyond the power of Congress in this respect. This court was confronted with a similar situation in the case of *Muskrat* v. *United States*, 219 U. S. 346 * * *."* (Record, p. 29.)

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*In referring to Article XII of the treaty of 1892 the court undoubtedly had in mind Article XVI.

The instant case is clearly distinguishable from the Muskrat case which arose under an Act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon the Supreme Court, on appeal, to determine the validity of certain acts of Congress. In that case there was no legal controversy and the purpose of the proceedings instituted in the Court of Claims was to restrain the enforcement of legislation upon the ground that the same was unconstitutional and void. The Court of Claims sustained the validity of the acts and dismissed the petitions. Upon appeal the Supreme Court held that the jurisdictional act could not be taken to intend to confer jurisdiction on the Court of Claims separately considered to pass on the Constitutionality of an act of Congress and, therefore, reversed the judgment of the Court of Claims and remanded the case to that court with directions to dismiss the petition for want of jurisdiction.

Said this Court:

> "This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the Constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its soverign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in

> question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the Act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."

In the instant case the power of Congress to enlarge the Constitutional jurisdiction of the Supreme Court by imposing upon it a non-judicial function is not involved. The Act of August 15, 1894, expressly provided that in the event petitioners' title to the Pipestone Reservation were questioned by the Government not only should the matter be referred to the Supreme Court for a decision but that the United States should furnish counsel to represent the interest of petitioners before the court. The express provision that counsel be provided to represent the interest of petitioners precludes the idea that the matter to be referred to the Supreme Court was not to be presented to it in the form of a legal controversy. The act is not invalid, therefore, because violative of the rule laid down in the Muskrat case.

Is the act invalid for some other reason?

"Manifestly," said the court, "it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge." The court, without specifying why it was impossible for the duty to be discharged,

then went on to say that "the Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect."

It may be that this conclusion that the Secretary of the Interior was powerless to invoke the jurisdiction of the Supreme Court under the law was based on the erroneous interpretation of Section 12 of the Act of August 15, 1894, that Congress had sought without constitutional power to enlarge the original jurisdiction of the Supreme Court.

The rules of interpretation that a statute must be so construed when possible as to carry out the intent of Congress, and that as between an interpretation that will render a statute of no effect and one that will render it effective, the latter is to be preferred, require no citation of authority in their support.

It is submitted that it is quite possible to so interpret the statute of August 15, 1894, as to carry out the plain intent of Congress.

In the first place, it was not mandatory under the statute that the Government should question the title of petitioners, nor that the Secretary of the Interior should refer "the matter" to the Supreme Court. The act, by its terms, merely provided that "*if* the Government questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, * * * the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal." (Italics added.)

Thus, it is seen that the act left it wholly discretionary with the Government whether it would or would

not question petitioners' title. It was only in the event that the Government questioned the title that the Secretary of the Interior was called upon to act, it being provided that if he failed to do so the title to the fee in the Pipestone Reservation should be deemed to be quieted in petitioners. In other words, if the Government should fail to question the title of petitioners before August 15, 1895, the fee was to vest in petitioners whether or not they possessed the same prior to that date. The facts show that the title was never questioned.

There is nothing peculiar about such a statute.

R. S. 1069 provides that no claim against the United States may be entertained by the Court of Claims unless the same is filed within six years from the time the cause of action upon which the claim is based arose.

In *Boteller* v. *Dominquez*, 130 U. S. 238, (1889) this court held that under the Act of March 3, 1853, no title to land in California, under Spanish or Mexican grants, should have any validity unless submitted to the Commission created by that act within two years, and confirmed by it or if rejected, confirmed by the District or Supreme Court of the United States. See also, *Barker* v. *Harvey*, 181 U. S. 481.

Statutes such as these containing limitations upon the time within which a claim may be asserted, or in the alternative be barred forever, are no more nor less than statutes of limitations, and it is obvious that if Congress can raise the bar of such statutes against others, it can raise it against the Government of the United States with the same object in view—to quiet disputes or titles.

In the second place, it is to be observed that Section 12 of the act did not require the Secretary of the Interior to institute a suit in the Supreme Court in the

event the petitioners' title were questioned. It merely required that the matter of any dispute over petitioners' title which the Government might raise, should be *referred* to the Supreme Court. This was not impossible. Ample machinery to accomplish such a reference existed. The mere fact that the Department of Justice held such a reference to be impracticable did not make it impossible. Among other ways, the question could have been raised by the Government in an injunction proceeding in the United States District Court. The slightest cooperation between the attorney for the Government and the attorney required to be appointed to represent petitioners would have enabled the matter to be referred to the Supreme Court on appeal within a year from August 15, 1894. The findings of fact are conclusive that no practical attempt was made to refer the matter to the Supreme Court by the utilization of the existing legal machinery. Yet, it was just such a contingency that Congress had in mind. If the Government failed to avail itself of the means at hand to question the title of petitioners and to have the matter in controversy referred within a year to the Supreme Court for a final decision, the title was to be quieted in petitioners.

But even if it had been impossible to refer the matter of a dispute over petitioners' title to the Supreme Court within a year from August 15, 1894, the statute would not be invalid. Section 3 of Article IV of the Constitution provides as follows:

> "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

It is submitted that under this provision Congress could impose any condition it saw fit with respect to

the vesting of title in petitioners, and that if it were impossible for the Government to litigate its claim to the land in question in the Supreme Court within a year, Congress still had the right to declare that if the matter were not referred to the Supreme Court within that time title should vest in petitioners.

The condition imposed by Congress that petitioners should have the fee unless a dispute over the title were referred to the Supreme Court within a year was simply a condition precedent to the vesting of title in petitioners by statutory grant: the failure of the Government to refer the matter to the Supreme Court prior to August 15, 1895, was but a fulfillment of the condition.

In *De La Croix* v. *Chamberlain*, 12 Wheat. 599, it was said:

> "The duty to settle private land claims and rights of inhabitants within ceded territory belongs to the political department of the Government, and Congress may discharge such duty or delegate it to the judiciary."

The foregoing language was quoted in *Barker* v. *Harvey*, 181 U. S. 487.

> "The duty of providing the mode of securing the private rights of property within the territory ceded by Mexico to the United States, and of fulfilling the obligations imposed upon the United States by the treaties, belongs to the political department of the Government, and Congress may either itself discharge the duty or delegate it to the judicial department."

Stoneroad v. *Stoneroad*, 158 U. S. 240. Cited in *Ainsa* v. *New Mexico & A. R. Co.*, 175 U. S. 79; 44 L. Ed. 80; 20 Sup. Ct. Rep. 28.

It has been held by this court repeatedly that a grant recognized and sanctioned by Congress as a perfect title, must be held such by the courts.

See:

Langdeau v. *Hanes*, 21 Wall. 521.
Treuier v. *Stewart*, 101 U. S. 797.
Kennedy v. *Hunt*, 7 How. 586.
Ainsa v. *New Mexico & A. R. Co.*, 175 U. S. 81.
Leverich v. *Mobile*, 110 Fed. 179.
Sullivan v. *Richardson*, 33 Fla. 1091; 14 So. 692.

The record shows that the Government did not question the ownership of petitioners within one year from August 15, 1894. Therefore, it must be held that the fee vested on August 15, 1895, in petitioners by virtue of the Act of August 15, 1894, and it is submitted that in holding otherwise the Court of Claims undertook to defeat the plain purpose of Congress and erred in so doing.

That Congress itself believed that the fee had vested in petitioners through the failure of the Secretary of the Interior to question their ownership by referring the matter to the Supreme Court prior to August 15, 1895, is shown by its subsequent action.

By the Act of June 7, 1897 (39 Stat. 87), the Secretary of the Interior was directed to negotiate through an Indian Agent, for the purchase of a part of the Reservation.

Is it reasonable to conclude that Congress would have directed that negotiations be conducted looking to the purchase of land from petitioners had it believed that the United States already owned the land and that petitioners did not own it?

II.

THE RIGHTS FOUND TO RESIDE IN PETITIONERS HAVE BEEN DENIED.

If the Act of August 15, 1894, (28 Stat. 286) is void as held by the Court of Claims, then the entire agreement of December 31, 1892, which Congress attempted to ratify by that act must be held void. In such case the petitioners must be deemed to possess merely the right which resided in them prior to the Act of August 15, 1894.

That right was held by the Court of Claims to be the right "to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes." (Record, p. 28.)

Here it is to observed that in sustaining in petitioners one right acquired by them under Article VIII of the Treaty of 1858, the Court of Claims wholly ignored other rights conferred by that article. That article also provided as follows:

> "And the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and *keep it open and free* to the Indians *to visit* and procure stone for pipes so long as they shall desire." (Record, p. 25. Italics added.)

The language of Article VIII considered as a whole is not ambiguous and is, therefore, not subject to interpretation by construction. It can only be interpreted in accordance with its plain import—that is, that petitioners shall have the right to visit the tract that was to be surveyed and marked so long as they shall desire for the purpose of procuring pipestones.

Plainly, if it had been the intent of the parties to the Treaty of 1858 that petitioners should have the right merely to take stone from the Pipestone Quarries as they might desire, but were not to have a tract of land surrounding the quarries set apart for their use while taking pipestone from the quarries, Article VIII would not have required that the United States survey and mark such a tract, and retain the same and *keep it open and free* to the Indians *to visit* and procure stone for pipes so long as they might desire to do so.

But even if the language were ambiguous and, therefore, subject to interpretation by construction, the limited construction placed on it by the Court of Claims that the right of petitioners was merely one "in the nature of an easement" in the quarries (Record, p. 29), is not warranted.

That a setting apart to the exclusive use of petitioners of a tract of land as distinguished from a mere easement in the quarries that were located thereon was contemplated is apparent from the necessities of the case. The habits of nomadic Indians are such that when they move from place to place they must find land sufficient to support them. Thus, it would have been a futile thing to recognize in petitioners the privilege of freely taking pipestone from the quarries so long as they might desire without also recognizing the right on their part to occupy the adjacent land so long as they might desire. In other words, since there was no restriction upon their right to take pipestone from the quarries, it necessarily follows in view of their mode of life that they were to be free so long as they might desire to occupy the Reservation while taking pipestone from the quarries.

The mere fact that the tract was surveyed and marked and set apart by the United States and given

the official title of "Pipestone Reservation," (Record, p. 26) shows that the tract as well as the quarries was intended to be reserved to their use.

If the language warrants construction at all it must be construed in accordance with the rules governing the interpretation of Indian treaties.

In *Worcester* v. *State of Georgia*, 6 Peters, 515, 582, this court said:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

How the words of the treaty were understood by petitioners plainly appears from the opinion of the Court of Claims in which it was declared that their claim to the land constituting the reservation as well as to the right to work the quarries was "persistently asserted." (Record, p. 29.)

But the court is not thrown back upon the understanding of "these unlettered people" and their necessities, in order to construe the treaty by the intent of the parties. That the United States itself long regarded the entire tract which it surveyed and marked and set apart pursuant to the Treaty of 1858 as the Pipestone Reservation, as subject to the exclusive use of petitioners is evident from the language contained in the Act of March 2, 1889 (25 Stat. 1012), in which the consent of a majority of the adult males of the Yankton Tribe to a sale of any part of the reservation was re-

quired. Pursuant to this act a right of way through the reservation was granted to the Cedar Rapids and Northern Railway Company for the sum of $1,740.00, which sum was distributed in 1891 among petitioners.

If the Government believed that petitioners had only owned an easement in the quarries as held by the Court of Claims, the right of way could have been granted through the reservation without requiring damages to be paid to petitioners.

Will the United States now be heard to contend that land which, under the Act of March 2, 1889, could not be granted to others by it merely as a right of way without the compensation of the Indians could be converted by it to the use of a Government institution two years later?

Again, in 1884, this court at the instance of the United States itself, in the case of *U. S.* v. *Carpenter*, 111 U. S. 435, vacated a patent granted May 15, 1874, to a settler on the reservation, the court holding that the officers of the United States could perform no act that was competent to invalidate petitioners' rights in the land.

If it had been the view of the Government of the United States that petitioners had no right in the reservation other than an easement in the quarries, it is not reasonable to assume that it would have instituted a suit to invalidate its own act, since the fee could have been patented, subject to petitioners' easement.

Still again, in 1887, the Government of the United States employed Federal troops for the removal from the Pipestone Reservation of intruders thereon. There is nothing in the records indicating that these intruders were deemed to be trespassing merely by interfering with the working of the quarries by petitioners. On the contrary, it appears from the findings

of fact of the Court of Claims that they were deemed to be trespassers upon the reservation and were removed for that reason. (Record, p. 26.)

By the Act of June 7, 1897, Congress directed that negotiations be conducted by the Secretary of the Interior for the purchase from petitioners of a parcel of land embraced by the Pipestone Reservation. (Record, p. 27.) Why should Congress have directed negotiations to be conducted looking to the purchase of a parcel of the tract if Congress believed that petitioners had no greater right in the tract than an easement for the purpose of quarrying pipestone?

All these subsequent dealings between the parties occurred in the face of a claim to the reservation by petitioner which in the language of the Court of Claims itself, was "long asserted and persistently adhered to," and in view of that claim, the language of the statute, and the construction placed on that language by the parties, it is submitted that Article VIII of the Treaty of 1858 must be construed to have reserved to petitioners more than the mere easement found by the Court of Claims to have constituted their right in the Pipestone Reservation.

R. S. 2126 provides that in all trials about the rights of property in which an Indian may be a party on one side and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian makes out a presumption of title from the facts of previous possession or ownership.

Is the self-asserted guardian of the Indians, or the respondent going to contend herein that it owes a lesser duty to its wards than to others, and that presumptions which exist in favor of its wards as against others do not exist in favor of its wards as against it, the guardian?

But that which is conclusive of the rights of petitioners is the decision of this court in *U. S.* v. *Carpenter*, 111 U. S. 435, with respect to petitioners' rights in the reservation. The facts in the case fully appear in the synopsis:

> "Where a tract of land reserved by treaty to the free and unrestricted use of the Indians was marked off upon the official charts of the Government, but the land office notwithstanding the treaty, permitted a piece of land scrip to be located upon a quarter section contained within the boundaries of the tract and a patent was issued to the person making entry, held, that the original entry was void, and that the patent unlawfully issued by the officers of the land department did not help it."

In the face of the decision of this court that a patent issued by the United States itself to land on the Pipestone Reservation was void, will the United States now be heard to contend that it, the United States, had a right to erect a governmental institution on the land without compensating petitioners for the land impressed to the needs of that institution?

Will the United States be heard by this Court to declare in one breath that the patenting of the land to another by one set of its officers should be voided by the court because violative of petitioners' rights and, therefore, illegal, and in the next that the taking of the land by another set of officers should be upheld as legal because petitioners have no right in the land inconsistent with such taking?

Clearly, the right which was found by this court to render void in 1884 the Carpenter patent, is a right that entitles petitioners to receive compensation for the land illegally taken by officers of the United States

under the acts of 1891 and 1897 for the purposes of a Federal Non-reservation Indian School, and it is submitted that in not so holding the Court of Claims erred.

But even if petitioners only have the limited right which was held by the Court of Claims to reside in them, the facts found by the Court of Claims deny that this right has been continuously secured to them in strict conformity with the terms of the Treaty of 1858.

In the report of Inspector James McLaughlin, it was declared that "all of said reservation"—which certainly includes the quarries—was appropriated by the Department of the Interior, and a school erected thereon as provided by Section 2 of the Act of February 16, 1891. (Record, p. 27.)

Is it conceivable that petitioners, a tribe numbering some 2,000 persons, would be permitted "the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they were accustomed to frequent and use for the purpose of procuring stone for pipes," notwithstanding the fact that a large governmental institution has been erected, and an experimental farm is being operated, on the land embracing the quarries?

Article VIII of the Treaty of 1858 expressly did not restrict the mode of the enjoyment of the right thereby conferred. What if 2,000 Indians should suddenly arrive on the premises of the Pipestone Industrial School and pitch their teepees on the cultivated lands of its experimental farm? Would their right to do so be free and unrestricted?

There can be but one answer.

> "It is not necessary that property should be absolutely taken. Serious interruption to the common and necessary use of property will be

equivalent to taking within the meaning of the Constitutional provision * * *."

Pumpelly v. *Green Bay & M. Canal Co.*, 13 Wall. 666.

See also:

Clifford v. *United States* (1893) 34 Court of Claims, 233; *Shoemaker* v. *United States* (1893) 148 U. S. 298.

Even, therefore, if the Court of Claims did not err in holding that the fee to the Pipestone Reservation was not acquired by petitioners by virtue of the Act of August 15, 1894, it erred in failing to render judgment pursuant to the Act of January 9, 1925, for the value of the property which it held to reside in them and which the facts found by it show has been taken from them by the United States.

IX.

The Compensation Due Plaintiffs.

There was never a case, perhaps, in which the equities in the matter of damages were more clear than they are in this case.

The facts show that pursuant to the Act of June 7, 1897, 30 Stat. 87, the Secretary of the Interior undertook to negotiate an agreement with petitioners looking to the purchase of their land by the United States, and that acting upon his authority Inspector James McLaughlin negotiated an agreement on October 2, 1899, for the transfer of their interest in the Pipestone Reservation to the United States for the sum of $100,000.00.

The said agreement was transmitted to the Department of the Interior on October 9, 1899, to Congress

by the department on March 24, 1900, and finally on April 4, 1906, the Senate Committee on Indian Affairs submitted a favorable report, recommending the ratification of the said agreement of 1892, on which no action has since been taken. (Record, p. 27.)

In *Calder* v. *Bull*, 3 Dall. 386, it was held that it is not to be presumed that Congress will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community and on making full satisfaction.

It has been shown that in this case the United States itself by the Act of 1889 recognized in petitioners a right for the surrender of which they, as owners, were entitled to compensation, induced them to agree to part with that right, fixed the value of it, obtained from them a formal instrument in which they agreed to accept that value, yet, by the act of February 16, 1891, took over the land on which to erect a Federal institution without making compensation therefor.

There are but two ways known to the law in which petitioners' interest in the Pipestone Reservation, even were it but an easement, could be extinguished by the United States—one by their voluntary consent, the other by the exercise by the United States of the sovereign right of eminent domain. (See *Johnson* v. *McIntosh*, 8 Wheat (U. S.) 543.) In this case Congress attempted to extinguish petitioner's title by the first means but failed to consummate its purpose through the ratification by the Senate of the contract which an agent of the United States had attempted in 1899 to negotiate with them. Had the Senate ratified the agreement of October 2, 1899, in which the purchase price of petitioners' interest was fixed at $100,000.00 appellants would have been entitled at law to the contract price and such damages as they may have suffered through the withholding of the payment thereof.

Had the United States undertaken to extinguish petitioners' interest in the Pipestone Reservation by the exercise, in strict accordance with law, of its sovereign right of eminent domain, they would have been entitled to receive an amount representing the appraised value of their property at the time it was taken with interest thereon from the date when payment was due. But in this case the United States did not exercise the right of eminent domain, and instead of appropriating petitioners' property to public use in the way prescribed by law, it took the property for public use in a way that constituted a misappropriation.

The Act of March 2, 1889, provided for the appraisal of the value of the Pipestone Reservation and that no part of the same was to be disposed of save with the consent of a majority of the male adults of the Yankton Tribe; the Act of February 16, 1891, for the appropriation of the property to public use; and the act of June 7, 1897, for the negotiation of an agreement with petitioners for the purchase of their interest in the said reservation. Taken together, these three acts and the course of the Government pursuant thereto constitute in effect a case of the exercise of eminent domain, and with a full understanding of the public use to which their property has been technically misappropriated, petitioners seek to obtain only that compensation to which they would have been entitled at law had the regular and formal proceedings required by the law of eminent domain been observed.

This court has been specially endowed with equity jurisdiction in this particular case by the jurisdictional Act of January 9, 1925. Petitioners do not claim the present value of their right in the Pipestone Reservation, nor do they resort to the legal remedy of an action in ejectment to recover the exclusive possession of the

property. Their sole desire is to obtain the just compensation for that which was taken from them for public use to which under the Constitution of the United States they are entitled.

In seeking to obtain the compensation, however, they rely upon the sense of equity of this court. It is submitted, in view of what has been said, that not only is it eminently equitable to assess their damages in accordance with the law of eminent domain, but that it would be highly inequitable to assess their damages at less than they would have been entitled at law to receive had the United States either appropriated their property in a legal manner, or ratified its own contract.

The Measure of Damages.

The facts show that acting for the Secretary of the Interior under the direct authority of the Act of June 7, 1897, Inspector James McLaughlin, an officer of the United States, made a thorough survey of the facts that were competent to establish the value of petitioners' interest in the Pipestone Reservation in 1899, and rendered a formal report to the Secretary of the Interior under date of October 2, 1899, in which as the result of the best obtainable evidence he appraised the value at $100,000.00. This price petitioners formally agreed by treaty to accept. The said report was approved by the Secretary of the Interior, and the payment of $100,000 to the petitioners by the United States for their property was recommended to Congress by the Secretary of the Interior on March 24, 1900. On April 4, 1906, the Senate Committee on Indian Affairs submitted a favorable report (S. Rep. 2369, 59th Congress, 1st Sess.) on S. 2993 for the ratification of the treaty which the said McLaughlin had negotiated with

petitioners. While the necessary legislation for the compensation by the United States of petitioners for their interest in the said reservation was not enacted by Congress, it is submitted that the value of the same as of 1899 was clearly established by the United States itself as not less than $100,000.00.

Were this a case of eminent domain instead of one of misappropriation, the United States, under the law of eminent domain, would have been bound by the agreement of petitioners to accept the appraised value of their property. Furthermore, the United States would be estopped from contesting that value.

> "If the party condemning takes possession of the property under the proceedings, * * * it will be estopped from prosecuting objections to the report of the proceedings."
>
> Lewis on Eminent Domain, p. 703.
>
> *Marquette, Houghton & O. R. R. Co.* v. *Probate Judge*, 53 Mich., 217.

An examination of the report of the said James McLaughlin to Congress through the Secretary of the Interior will show that it is in every way similar to the report ordinarily required of the appraisers in a case of eminent domain. Thus, without regard to what is the actual title or interest of petitioners in the Pipestone Reservation, or what was the interest before its taking, it is submitted that it would be inequitable in the premises for this court now to assess petitioners damages at less that the amount which they were induced by the United States itself to agree to accept for the property that has been misappropriated.

The report of Inspector McLaughlin in which the value of petitioners' interest in the Pipestone Reservation was appraised shows that its value was not less in

1891 than in 1899. Under the law of eminent domain where just compensation of the owners of property appropriated to public use is withheld, the owners are entitled to an equivalent for such withholding, and the equivalent the law holds to be legal interest.

(See Lewis on Eminent Domain, pp. 660, 584, and 703 for collected authorities.)

Inasmuch, therefore, as the misappropriation of petitioners' property to public use occurred in 1891 (Act of Feb. 16, 1891), it is submitted that they are entitled to at least the agreed value of the same at that time, or $100,000.00, with interest thereon to date.

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